Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

BANK OF CHINA,

Petitioner,

vs.

VOEST-ALPINE TRADING USA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an American plaintiff's mere consequential financial loss in the United States due to a foreign state's failure to perform a contract overseas is a sufficient "direct effect" under the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), so as to deprive the foreign state of its jurisdictional immunity — even though no legally significant act either took place in the United States or was contractually required to take place in the United States, as would be required under *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), and decisions of the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is wholly owned by the government of the People's Republic of China and has no subsidiaries within the meaning of the rule.

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Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated June 12, 1998 ..... 1a

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Petitioner, the Bank of China[1], respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887 (5th Cir. 1998), and is set forth in Appendix ("App.") A hereto at 1a-22a. The opinion of the United States District Court for the Southern District of Texas, affirmed by the Fifth Circuit, has not been reported. It is set forth in its entirety in Appendix B hereto at 23a-29a.

GROUNDS FOR JURISDICTION

The Fifth Circuit issued its decision on June 12, 1998. Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied in the Fifth Circuit's Order of July 9, 1998 (App. at 30a). This Petition for a Writ of Certiorari is filed within ninety days of that date.

The Fifth Circuit's decision affirmed an Order of the District Court denying Petitioner's motion for judgment on the pleadings to dismiss the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604, and is accordingly, reviewable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949).

Jurisdiction in this Court is conferred by 28 U.S.C. §§ 1254(1), 1330, and 1602-1611.

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1. Although Petitioner's New York Branch was named as a defendant below, it is not separately incorporated but is an integral part of Petitioner. All references herein to Petitioner include its New York Branch, unless otherwise indicated.

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 ("FSIA"), provides in relevant part:

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
>
> **§ 1605. General exceptions to the jurisdictional immunity of a foreign state**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case —
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

Petitioner is a Chinese bank owned by the government of China and headquartered in Beijing and as such is both a "foreign state" and "an agency or instrumentality of a foreign state" under the FSIA, 28 U.S.C. § 1603(a). Respondent is a New York corporation headquartered in Texas and owned by the government of Austria.[2]

This action arises out of a letter of credit issued in July 1996 by Petitioner's Sub-branch in Jiangyin, China, for Respondent's benefit (the "Letter of Credit") in connection with Respondent's sale and shipment of 1,000 tons of styrene monomer to its customer in China.

Petitioner's Letter of Credit called for Respondent, or its negotiating bank, to present specified documents at the Jiangyin Sub-branch's counter and stated that, upon proper presentment of all documents and drafts, Petitioner would pay Respondent the appropriate amount (App. at 3a). The Letter of Credit did not otherwise designate a particular place of payment.

Respondent delivered its draft and documents to its bank, Texas Commerce Bank ("TCB") of Houston, for presentment to Petitioner's Jiangyin Sub-Branch. TCB then forwarded Respondent's draft and documents by courier to Petitioner's Jiangyin Sub-branch. After review of the documents, however, Petitioner's Jiangyin Sub-branch sent a telex to TCB rejecting Respondent's documents for various discrepancies and refusing to pay the draft.

Respondent then commenced an action in China against its customer based upon the contract of sale and, shortly

2. The fact that Respondent is wholly owned by the government of Austria is reflected in the record on appeal (Doc. 45, p. 23).

thereafter, commenced the instant action in the United States against Petitioner based upon the Letter of Credit.

In the instant action, Respondent contends that Petitioner's Jiangyin Sub-branch's rejection of Respondent's presentation was ineffective because its telex to TCB was not issued within the seven banking days required under Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500"), and that Petitioner's refusal to make payment was, therefore, a breach of its obligations under the Letter of Credit.

Petitioner answered the complaint, asserted immunity under the FSIA, 28 U.S.C. § 1604, and moved for judgment on the pleadings to dismiss the action for *inter alia* lack of subject matter and personal jurisdiction.

The District Court denied Petitioner's motion because it concluded that the lawsuit was "based upon an act outside the United States, in connection with the Bank of China's commercial activity outside the United States, that caused a direct effect in the United States" (App. at 5a-6a) and, so, fell within the commercial activity exception of 28 U.S.C. § 1605(a)(2).

In response to Petitioner's motion, Respondent argued that:

> [Petitioner's] refusal to pay under the letter of credit was an act performed in connection with its commercial issuance of a letter of credit, which directly resulted in [Respondent's] nonreceipt of funds into its bank account in Texas.

App. at 10a.

In reply, Petitioner contended that there was no direct effect in the United States because:

> the United States was neither the "place of payment" nor the place of any other "legally significant act" as required . . . by [this Court] in [*Republic of Argentina v. Weltover*, 504 U.S. 607 (1992)].

App. at 10a.

The District Court accepted Respondent's contention and denied Petitioner's motion, and two judges of the court of appeals agreed, stating:

> Consistent with *Weltover*, this court had earlier [i.e., prior to this Court's 1992 decision in *Weltover*] held that a financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction under the third clause of the commercial activity exception.

App. at 11a.

In support of its conclusion, the majority of the Fifth Circuit panel cited the Fifth Circuit's own pre-*Weltover* decision in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir. 1985) (App. at 11a), as well as other pre-*Weltover* decisions from the Fifth, Sixth, Second, and Eleventh Circuits. The majority also compared Fifth Circuit decisions in which the plaintiffs were American and Swedish corporations respectively and in which "direct effect" was found for the American corporation but not for the Swedish corporation (App. at 11a-12a).

The Fifth Circuit concluded that "*Callejo* controls the outcome of this case" (App. at 12a) and that, under *Callejo*, the "direct effect" exception applies because Respondent "is an American corporation that suffered a nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank" (App. at 17a-18a).

In so holding, the majority of the panel expressly acknowledged Petitioner's contentions that, in this case, no legally significant act took place or was to take place in the United States and that the post-*Weltover* decisions in the Ninth, Tenth, Second, and Eighth Circuits required the occurrence of some legally significant act in the United States in order for the "direct effect" exception to apply (App. at 12a-13a).

The majority stated, however, that the Fifth Circuit has "not adopted this [legally significant act] requirement" (App. at 13a), thereby expressly recognizing a split in the circuits on a critical element of federal law.

The majority also acknowledged that, in *Weltover*, this Court "ultimately found a direct effect in the fact that the foreign state in that case had, under its contract, breached its obligation to pay (*i.e.* perform) in the United States" (App. at 13a) — which was the "legally significant act" supporting jurisdiction in that case and which is lacking in the instant case.

The majority of the panel, however, viewed the "legally significant act" in *Weltover* as optional, stating:

> But *Weltover*'s reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause [of the commercial activity exception]. *See Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143,

> 1147 (D.C. Cir. 1994) (Wald, J., concurring). A legally significant act in the United States will certainly cause a direct effect in the United States, but that does not mean that a direct effect in the United States can be caused *only* by a legally significant act in the United States.

App. at 13a-14a (emphasis in original).

Accordingly, the Fifth Circuit majority declined to follow the decisions in the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits and rejected those circuits' construction of *Weltover,* holding instead that a "direct effect" in the United States may be found whenever an American plaintiff suffers financial loss.

In his concurring opinion, Judge Reavely disagreed with both the majority's rejection of the "legally significant act" test and of the result in this case but stated that he felt bound to concur by the Fifth Circuit's decision in *Callejo* (App. at 20a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT SQUARELY CONFLICTS WITH THE DECISIONS OF THE SECOND, EIGHTH, NINTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS.

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

The "commercial activity" exception to immunity provides in relevant part that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This exception to a foreign state's jurisdictional immunity is sometimes called the "direct effect" prong of the "commercial activity" exception.

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court found that Argentina's failure to meet its obligation to non-U.S. plaintiffs to make payment in New York on Argentina's bonds that were, by their terms, payable in New York had a direct effect in the United States sufficient to satisfy the "commercial activity" exception.

In its decision in this case, the Fifth Circuit stated that "[w]hether any given commercial activity abroad has a direct effect in the United States is a question that generally admits of no easy, clear-cut answer" and commented that, in *Weltover*, "the Supreme Court has added significant (though not extensive) guidance on this question" (App. at 10a-11a).

The Fifth Circuit reasoned that:

> [A] financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction under the third clause of the commercial activity exception.

App. at 11a, citing pre-*Weltover* decisions of the Fifth, Sixth, Second, and Eleventh Circuits. The majority found that its reasoning was "[c]onsistent with *Weltover*" (App. at 11a).

Petitioner argued below, however, that the mere fact that the plaintiff is an American company is not sufficient to overcome the presumption of immunity. Rather, where a cause of action consists of a failure to pay (as in *Weltover* and as in the instant case), there must be some "legally significant act" required to be performed by the foreign state in the United States or no "direct effect" could be found. In *Weltover*, Argentina was contractually obligated to make payment in New York; here, there was no contractual obligation to make payment (or any performance) in the United States.[3]

The Fifth Circuit majority expressly acknowledged that the Ninth, Tenth, Second, and Eighth Circuits have adopted this "legally significant act" test but concluded: "The Fifth Circuit, however, has not adopted this requirement, and we think, for good reasons" (App. at 13a).

In addition, the majority found support in Judge Wald's concurring opinion in a District of Columbia Circuit decision, although the majority in that case adopted a "legally significant act" test.

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3. Although Voest-Alpine's presenting bank had requested that payment be sent to its account in Texas, the terms of the letter of credit did not require Petitioner to make payment in Texas or to follow the payment request of a presenting bank, and Petitioner's custom of accommodating presenting bank requests did not create such a contractual requirement. In any event, in the decision below, the majority did not conclude that, in the instant case, the place of performance of the letter of credit was Texas but rather that a direct effect existed because of "a financial loss incurred in the United States by an American plaintiff" (App. at 11a).

The decisions of the five circuits expressly rejected by the Fifth Circuit majority are as follows.

In *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997), the Ninth Circuit employed a "legally significant acts" test to find that, because Nigeria was "obligated to make payment in New York," its failure to do so was a sufficiently "direct effect." The *Adler* court stated:

> As in *Weltover*, since New York was the place of performance of Nigeria's ultimate contractual obligation, its failure to satisfy that obligation necessarily had a direct effect in the United States.

107 F.3d at 727.

Significantly, in finding the requisite "direct effect," the Ninth Circuit ignored the fact that Adler himself was a U.S. citizen, but instead relied solely upon New York's locus as the place of contractual performance by Nigeria.

In *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995), the Tenth Circuit concluded that a foreign state's failure to make payment outside the U.S. did not have a sufficiently "direct effect" upon the American plaintiff even though conversion of the payment funds into U.S. dollars "meant that at some point a United States bank had to be involved." 33 F.3d at 1238.

In so holding, the Tenth Circuit expressly rejected the American plaintiff's argument that its "lost profits" and suffering of "other harm in the United States" as a result of the foreign state's acts overseas was a sufficient "direct effect." 33 F.3d at 1238. Rather, the Tenth Circuit employed a "legally

significant acts" test and concluded that, where "the cause of the injury is an omission," the absence of any contractual obligation to perform the omitted act in the United States precluded finding the requisite "direct effect" in the United States. 33 F.3d at 1239.

In *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994), the Second Circuit held that a foreign state's wrongful detention of an American plaintiff's aircraft at an airport in Lagos, Nigeria did not cause a "direct effect" in the United States because, applying the "legally significant acts" test, the alleged conversion took place entirely in Nigeria.[4]

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4. In the instant case, the Fifth Circuit majority suggested that the Second Circuit "appears to have jettisoned the legally significant acts requirement." App. at 13a n.9, *citing Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994). In fact, however, the Second Circuit in that case expressly reaffirmed the application of the test in finding a "direct effect," stating:

> The failure of the Iraqi Banks to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*. Furthermore, the requisite "material connection" between Commercial's cause of action and the "commercial activity" that is the jurisdictional basis is met despite Commercial's reliance on an agent to collect the sums due.

15 F.3d at 241. In *Commercial Bank*, then, the nonperformance of a contractual obligation in the United States was, in fact, an element of the cause of action asserted. Moreover, in *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127 (2d Cir. 1998), in which the claim against the foreign state was for failure "to make payment on a letter of credit that designated New York City as the place of payment," 148 F.3d at 129, the Second Circuit expressly used the "legally significant acts" to conclude that, under *Weltover*, the "commercial activity" exception applied. 148 F.3d at 133. The "legally significant acts" test is, therefore, still viable in the Second Circuit.

Like the Tenth Circuit in *United World Trade*, the Second Circuit reached this conclusion in *Antares* despite the fact that banks in the United States were involved in the transactions at issue and despite plaintiff's argument that its suffering of financial loss in the United States as a result of the foreign state's act abroad was enough to satisfy the exception. The *Antares* court reasoned:

> Antares argues that a "direct effect" of the tort occurred in the United States because an American partnership suffered a financial loss. We are unpersuaded. To be sure, the detention of Antares' sole asset affected the financial well-being of the American partnership. However, the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception.

999 F.2d at 36.

The Second Circuit in *Antares* considered the effect of a contrary holding and rejected it because it would permit the exception to "eviscerate" the rule, stating:

> If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states. Many commercial disputes, like the present one, can be pled as the torts of conversion or fraud and would, if appellant is correct, result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff.

999 F.2d at 36.

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the Eighth Circuit referred to the "legally significant acts" test of the Second Circuit's decision in *Weltover* to conclude that the acts of a foreign state (Air Canada) in Canada did not cause a "direct effect" on an American plaintiff (General Electric), even though it may have experienced financial loss in the United States, since the "alleged acts of concealment . . . occurred in Canada." 991 F.2d at 1385.

Finally, in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995), the District of Columbia Circuit, although not expressly referring to the "legally significant acts" test[5], found that a foreign state bank's failure to make payment on letters of credit held by two Irish corporations did not cause a "direct effect" in the United States — even though funds in United States banks had been used to make payments under the letters of credit — because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid by Rafidain or to Goodman." 26 F.3d at 1146.

As Judge Wald stated in her concurring opinion in *Goodman Holdings* (relied upon by the Fifth Circuit majority herein), the District of Columbia Circuit declined to find a "direct effect" because New York was not "a *contractually designated place of performance.*" 26 F.3d at 1147 (emphasis in original).

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5. Other decisions in the District of Columbia Circuit have expressly referred to a "legally significant acts" requirement. *See, e.g., Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (a plaintiff must establish that "something legally significant actually happened in the U.S.").

In contrast to the Second, Eight, Ninth, Tenth, and District of Columbia Circuits, the Fifth Circuit majority in this case expressly rejected any requirement that a "legally significant act" occur in the United States or, alternatively, where a cause of action is based upon a foreign state's nonperformance or omission, the foreign state be contractually obligated to perform in the United States.

Instead, the decision of the majority held that, even where the United States was not the place of performance and where the foreign state was not contractually obligated to make payment in the United States, the fact that an American plaintiff suffered financial loss in the United States was enough to provide the requisite "direct effect" in the United States depriving the foreign state of its jurisdictional immunity.

In his concurring opinion below, Judge Reavely expressly dissented from the majority's rejection of the "legally significant acts" test but felt himself bound to follow the majority because of the Fifth Circuit's pre-*Weltover* decision in *Callejo v. Bancomer*. Indeed, Judge Reavely specifically rejected the majority's conclusion that an American plaintiff's financial loss constitute's a sufficient "direct effect" in the United States, stating:

> My own reading of the statute would be that a consequential loss, the result and not an element of the claim itself, is less than "direct." If the mere financial loss resulting from the breach or tort satisfies the statute, an American plaintiff need prove only commercial activity. Perhaps that was the intent of Congress, but I agree with the other circuits [referring to the Tenth Circuit's decision in *United World Trade*, the Second Circuit's decision

in *Antares*, and the District of Columbia's decision in *Goodman Holdings*.]

App. at 20a.

The split of the circuits expressly referred to in the Fifth Circuit's decision, both majority and concurring, should now be resolved by this Court.[6]

II.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW.

The issue upon which the circuits are split is one of overriding importance, both in its effect on FSIA immunity and in the larger context of U.S. foreign relations and international trade. This Court has acknowledged that long-standing principles of international comity underlie the doctrine of sovereign immunity and the FSIA. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983).

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6. If pre-*Weltover* decisions are considered, the split becomes even broader. Thus, the Seventh Circuit expressly employed a "legally significant acts test" in *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 582 & n.9 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989). A similar approach may be employed in the Third Circuit. *See Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 403 (D. N.J. 1988) (foreign state's acts in the United States, when combined with financial loss to an American plaintiff, sufficient to constitute "direct effect in the United States"). On the other hand, the Sixth and Eleventh Circuits apparently found injury to an American plaintiff sufficient to satisfy the "direct effect" prong of the "commercial activity" exception, without requiring a "legally significant act" in the United States. *See Gould v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982).

Like the majority in this case (App. at 10a-11a), recent commentators have criticized *Weltover* for offering not enough "guidance" to the lower courts in determining when a "direct effect" may be found. *See* Leacock, *The Joy of Access to the Zone of Inhibition:* Republic of Argentina v. Weltover, Inc. *and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976*, 5 Minn. J. Global Trade 81, 121 (1996) ("As a result [of *Weltover*], American courts have too much latitude to fashion their own responses to litigation under the FSIA and will continue to do so until the Court re-examines and retrenches the commercial activity exception to the doctrine of sovereign immunity."); Schano, Note, *The Scattered Remains of Sovereign Immunity for Foreign States after* Republic of Argentina v. Weltover, Inc. — *Due Process Protection or Nothing*, 27 Vand. J. Transnat'l L. 673, 698 (1994) ("Although *Weltover* comports with the language and legislative history of the FSIA for the most part, it offers little guidance to lower courts.").

Eliminating inconsistency in determining whether to recognize the jurisdictional immunity of foreign states was Congress's express intent in enacting the FSIA "since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

The issue raised by this Petition, however, concerns more than a split of the circuits or the use of the "legally significant acts" test in considering whether jurisdiction exists: it concerns whether a plaintiff's being a U.S. citizen is enough, in and of itself, for the "commercial activity" exception to apply.

The FSIA was intended to prevent U.S. courts from becoming international courts of claims adjudicating disputes that have little significant relation to the United States. *See*

Comment, *Clearing the Air or Muddying the Waters? Defining "A Direct Effect in the United States" Under the Foreign Sovereign Immunities Act after* Republic of Argentina v. Weltover, 18 Hous. J. Int'l L. 261, 284 (1995), discussing *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 25 (1976).[7]

As Judge Reavely acknowledged in his concurring opinion below, the Fifth Circuit's decision not only departs from the sound reasoning of other circuits but also means that, in order to qualify under the "commercial activity" exception, "an American plaintiff need prove only commercial activity" (App. at 20a), which would apply in all commercial cases.

In effect, then, under the Fifth Circuit's decision in this case, an American will always be able to sue a foreign state in a commercial case, and as the Second Circuit stated in *Antares*, "the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states." 999 F.2d at 36.

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7. Similarly: "[A] creditor anywhere in the world would be able to establish a 'direct effect' in the U.S. simply by requesting, after the contract is made, that the debtor make payment in New York." Zaslowsky, *Foreign Sovereign Immunity: Recent Developments*, N.Y.L.J., Jan. 17, 1996, p. 1 col. 2, at p. 4 col. 4.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 12, 1998

United States Court of Appeals,
Fifth Circuit

No. 97-20322

VOEST-ALPINE TRADING USA CORPORATION,

Plaintiff-Appellee,

v.

BANK OF CHINA; Bank of China New York Branch,

Defendants,

Bank of China,

Defendant-Appellant.

Domestic seller brought action against Bank of China for breach of letter of credit issued as security for performance of Chinese buyer's payment obligation. Bank of China moved for judgment on the pleadings, alleging that it was immune from suit under Foreign Sovereign Immunities Act (FSIA). The United States District Court for the Southern District of Texas, Vanessa D. Gilmore, J., denied motion. Bank of China appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that Bank of China's failure to remit funds to domestic seller's designated bank account in United States caused direct effect in United States, and courts of United States thus had jurisdiction

over domestic seller's action pursuant to commercial activities exception to FSIA.

Affirmed.

Reavley, Circuit Judge, concurred and filed opinion.

* * *

J. Cary Gray, Edwin Armistead Easterby, Looper, Reed, Mark & McGraw, Houston, TX, for Plaintiff-Appellee.

Marsha Zimmerman Gerber, Butler & Binion, Houston, TX, Mary C. Mone, Christopher Brady, Hollyer, Brady, Smith, Jroxell, Barrett, Rockett & Hines, New York City, for Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, and REAVLEY and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The issue in this appeal is whether, having engaged in a commercial transaction with an American corporation, a foreign state's failure to remit funds to the corporation's designated bank account in the United States is sufficient to support jurisdiction over the foreign state under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). The district court held that it is. We agree. Because a financial loss was incurred in the United States

by an American plaintiff as an immediate consequence of the foreign state's commercial activity abroad, the loss constituted a direct effect within the scope of the third clause of the commercial activity exception. We, therefore, affirm.

I

A

In June 1995, Voest-Alpine Trading USA Corporation ("Voest-Alpine"), a New York corporation with its principal place of business in Houston, Texas, agreed to sell 1,000 metric tons of styrene monomer to the Jiangyin Foreign Trade Corporation ("JFTC") for USD $1,000 per metric ton. The shipment was to be delivered to the Port of Zhangjiagang, China, by July 1995. As security for performance of JFTC's payment obligation, the Bank of China issued an irrevocable letter of credit.

The Bank of China is an instrumentality of the People's Republic of China. On July 6, 1995, the Bank of China's Jiangyin Sub-Branch issued the letter of credit in the amount of USD $1.2 million. The letter of credit referred to JFTC as the applicant and Voest-Alpine as the beneficiary. The letter provided that upon proper presentment of all documents and drafts to the Jiangyin Sub-Branch, the Bank of China would pay Voest-Alpine the appropriate amount. It did not designate a particular place of payment, though it did state that it was to be governed by the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500"). Its expiry date was August 10, 1995, and the United States was the place of expiry.

Appendix A

The Jiangyin Sub-Branch sent the letter of credit via telex to the Bank of China's New York Branch, requesting that the New York Branch "advise" Voest-Alpine of the letter's issuance. It did so, and on July 22, 1995, Voest-Alpine delivered 997.731 metric tons of styrene monomer to the Port of Zhangjiagang, China. Shortly after its arrival, the shipment was unloaded into a customs warehouse, whereupon it was seized by Chinese customs.[1] Voest-Alpine then provided its bank, the Texas Commerce Bank ("TCB") in Houston, Texas, with the necessary documents for presentment to the Bank of China. On August 3, 1995, TCB forwarded the documents by courier to the Jiangyin Sub-Branch, which received them on August 9.

The documents were accompanied by a cover letter requesting that the Bank of China notify TCB immediately of any discrepancies or confirm that the documents had been accepted for payment. The cover letter also stated that payment was to be sent by wire to Voest-Alpine's TCB bank account in Houston. On August 11, the Bank of China telexed TCB, alleging that the documents contained several discrepancies and stating that it was contacting JFTC as to whether the discrepancies should be waived. The Bank of China did not, however, reject the documents at that time. TCB and Voest-Alpine vigorously maintained that the documents were conforming. Finally, on October 4, 1995, after several correspondences between TCB, Voest-Alpine, the Bank of China, and JFTC, the Bank of China telexed TCB that JFTC insisted on refusal of payment and that the documents would be returned.

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1. Apparently, JFTC had an obligation to pay a tariff of sorts to the People's Republic of China, even though JFTC is owned, at least beneficially, by the People's Republic of China.

Appendix A

B

On October 20, 1995, Voest-Alpine filed the instant action against the Bank of China in the United States District Court for the Southern District of Texas in Houston, seeking damages for breach of the letter of credit.[2] The Bank of China responded with a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), asserting lack of jurisdiction and improper venue. It argued to the district court that, as a "foreign state" under the FSIA, 28 U.S.C. § 1603, it is immune from suit in any federal or state court in the United States unless one of the enumerated exceptions to the FSIA applies. Because none of the exceptions apply, the Bank of China contended, the action should be dismissed. Voest-Alpine countered that the "commercial activity" exception applied because its action was based upon commercial activity conducted by the Bank of China (or its agents) in the United States and upon commercial activity by the Bank of China outside the United States that caused a direct effect in the United States.

On June 30, 1997, the district court denied the Bank of China's motion, concluding that Voest-Alpine had alleged facts sufficient to demonstrate the applicability of the commercial activity exception. Based on the pleadings, the court determined that the lawsuit was based upon an act outside the United States, in connection with the Bank of China's commercial activity outside the United States, that caused a direct effect in the

2. Previously, on October 16, 1995, Voest-Alpine commenced an action against JFTC in the Superior People's Court of Jiangsu Province. Following a hearing, the Chinese court entered judgment in Voest-Alpine's favor for the full amount of the contract price. Voest-Alpine avows that it is not seeking double recovery in the instant action.

United States. Thus, the court held, the lawsuit fell within the scope of the third clause of the commercial activity exception and, as a result, judgment on the pleadings dismissing the case would be inappropriate. The Bank of China appeals.[3]

II

The district court's conclusion as to whether the Bank of China enjoys sovereign immunity under the FSIA is a question of law for which the standard of review is *de novo*. *See Stena Rederi AB v. Comision de Contratos,* 923 F.2d 380, 386 (5th Cir.1991). As a procedural matter, the case comes to us on appeal of the district court's refusal to dismiss the action on a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). Judgment on the pleadings is appropriate only if material facts are not in dispute and questions of law are all that remain. *See Hebert Abstract Co. v. Touchstone Properties, Ltd.,* 914 F.2d 74, 76 (5th Cir.1990). Here, the parties have not yet conducted discovery and, therefore, we must assume the truth of factual allegations in the complaint. *See Saudi Arabia v. Nelson,* 507 U.S. 349, 351, 113 S.Ct. 1471, 1474, 123 L.Ed.2d 47 (1993); *compare Baker v. Putnal,* 75 F.3d 190, 197-98 (5th Cir.1996) (if the district court bases its ruling on facts developed outside the pleadings, we review the ruling as an

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3. The Bank of China also appeals the district court's refusal to dismiss the case for lack of venue. Because the district court's decision in this respect is not a final appealable order under 28 U.S.C. § 1291, *see Louisiana Ice Cream Distrib., Inc. v. Carvel Corp., Franchise Stores Realty Corp.,* 821 F.2d 1031, 1033 (5th Cir.1987), we decline to consider it here.

order granting summary judgment).[4] With these standards in mind, we turn to the merits.

III

A

"The FSIA sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues raised in federal and state courts." *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 532 (5th Cir.) (quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610), *cert. denied,* 506 U.S. 956, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992). Under the FSIA, foreign states and their agencies or instrumentalities are generally immune from suit in the courts of the United States. *Stena Rederi,* 923 F.2d at 386 (citing 28 U.S.C. § 1604). There are, however, exceptions to the rule. Our case today turns on the "commercial activity" exception. This exception abrogates sovereign immunity in any case based upon a foreign state's commercial activity that has a jurisdictional nexus with the United States. *See* 28 U.S.C. § 1605(a)(2).

The commercial activity exception is broken down into three clauses, each identifying an act that is sufficiently connected to the United States to satisfy the jurisdictional nexus requirement. Specifically, the exception provides jurisdiction over a foreign state in any case:

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4. Voest-Alpine attached to its complaint the letter of credit and other documents allegedly embodying its agreement with the Bank of China, the terms of the agreement between the parties being a legal issue underlying the action. Because these documents thereby became part of Voest-Alpine's pleadings, the district court's consideration of the documents did not make this a summary judgment case.

> in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). All three clauses require that the cause of action be "based upon" a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action. *See Nelson,* 507 U.S. at 357, 113 S.Ct. at 1477. All three clauses further require some "commercial" aspect to the foreign state's actions. Because the FSIA provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," *see* 28 U.S.C. § 1603(d), the question is not whether the foreign state is acting with a profit motive instead of seeking to fulfill uniquely sovereign objectives, but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.' " *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992) (quoting *Black's Law Dictionary* 270 (6th ed. 1990)).

Here, the parties do not dispute that the Bank of China is a foreign state engaged in commercial activity. Indeed, because all of the Bank of China's acts and activities relevant

to this case are indisputably "commercial" in nature, the second clause is inapplicable.[5] This appeal thus focuses on whether Voest-Alpine's cause of action is based on (1) any of the Bank of China's actions in the United States or (2) any of the Bank of China's actions outside the United States that caused a direct effect in the United States. The elements of Voest-Alpine's cause of action are: (a) issuance of the letter of credit, (b) timely presentation of necessary documents, and (c) failure to pay on the letter of credit.[6] There is no real question that the Bank of China issued the letter of credit and was presented[7] the necessary documents in China, and we shall assume without deciding that neither of these acts *directly* affected the United States. The question, then, is whether the Bank of China's failure to pay occurred in the United States (first clause) or caused a direct effect in the United States (third clause).

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5. The second clause permits jurisdiction if the cause of action is based on any "act" in the United States, provided it occurs "in connection with" commercial activity outside the United States. Because the first clause permits jurisdiction based on "commercial" acts in the United States, the second clause is generally understood to apply to noncommercial acts in the United States that relate to commercial acts abroad. *Cf. Nelson,* 507 U.S. at 358, 113 S.Ct. at 1478 (noting differences between first and second clauses).

6. The Bank of China argues that the third element of Voest-Alpine's cause of action is not the failure to pay, but failure to reject the documents within seven banking days. The Bank of China may indeed be correct, but the result is the same either way. *See infra* note 12 and accompanying text.

7. Voest-Alpine argues that presentment occurred when it furnished conforming documents to TCB in Texas. But as the Bank of China correctly notes, TCB was Voest-Alpine's agent and thus acting as the "presenting bank." Presentment occurred when TCB presented the documents to the Jiangyin Sub-Branch in China.

Appendix A

B

The district court found jurisdiction under the third clause of the commercial activity exception.[8] That is, the district court determined that this action was based upon an act outside the United States, in connection with the Bank of China's commercial activity outside the United States, that caused a direct effect in the United States. In arriving at this conclusion, the district court relied on Voest-Alpine's allegations that the Bank of China's refusal to pay under the letter of credit was an act performed in connection with its commercial issuance of a letter of credit, which directly resulted in Voest-Alpine's nonreceipt of funds into its bank account in Texas. The Bank of China contends that the district court erred in finding a direct effect in the United States because the United States was neither the "place of payment" nor the place of any other "legally significant act" as required, the Bank argues, by the Supreme Court in *Weltover*.

(1)

Whether any given commercial activity abroad has a direct effect in the United States is a question that generally admits of no easy, clear-cut answer. Indeed, at one time, we described

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8. The district court also concluded that Voest-Alpine had pled facts sufficient to establish jurisdiction under the first clause based on its allegations that the letter of credit had been issued "through" the Bank of China's New York Branch. In particular, Voest-Alpine alleges that the New York Branch served not only as an advising bank, but also "opened an internal file on the letter of credit" and made "numerous phone calls to [Voest-Alpine] regarding payment on the letter of credit." Because we find jurisdiction proper under the third clause, we do not reach the question whether these allegations support jurisdiction under the first clause.

the determination as " 'an enterprise fraught with artifice.' " *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir.1985) (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir.1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982)). Since that time, however, the Supreme Court has added significant (though not extensive) guidance on this question. In *Weltover, supra*, the Court addressed what constitutes a "direct effect" and announced a fairly simple test: "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.' "504 U.S. at 607, 112 S.Ct. at 2168 (citation omitted). At the same time, the Court expressly rejected other requirements, adopted by several of the courts of appeals, that the effect be either "foreseeable" or "substantial." *Id.* In short, an effect in the United States is sufficient to support jurisdiction under the commercial activity exception so long as it is "direct" — with no other modifying adjectives.

Consistent with *Weltover*, this court had earlier held that a financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction under the third clause of the commercial activity exception. *See Callejo*, 764 F.2d at 1111-12; *accord Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 221 (5th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1575, 94 L.Ed.2d 766 (1987); *Gould v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir.1988); *Texas Trading*, 647 F.2d at 312; *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir.1982) (demand for payment on letter of credit issued by American bank causes direct effect in the United States because it results in depletion of funds in the American bank); *see also Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1387 (5th Cir.1992) (finding a direct effect because a breach of contractual obligation to provide legal

defense resulted in an expenditure of considerable funds by an American corporation defending itself in an action brought in Arkansas); *compare Stena Rederi,* 923 F.2d at 390 (third clause did not apply because the plaintiff was a Swedish corporation, and "any financial loss it ha[d] suffered affect[ed] Sweden, not the United States"). *Callejo* controls the outcome of this case.

The Bank of China, however, does not agree. First, it strenuously argues that a finding of direct effects in the United States requires the foreign state to have engaged in some "legally significant act" in the United States. Second, it contends that *Callejo* is distinguishable because the direct effects in that case were based on a continuous series of commercial transactions in the United States. Thus, the Bank maintains, *Callejo* involved a far greater quantity of foreign activity in the United States than is present here and involved factual circumstances in which the place of payment was the United States, not the foreign state. We address each aspect of this argument, beginning with the so-called legally significant acts requirement.

(a)

The Bank of China contends that its failure to pay on the letter of credit did not have a direct effect in the United States because it did not engage in any legally significant act in the United States. A "legally significant act," as defined by courts adopting this requirement, is an act "giving rise" to the cause of action. *See, e.g., Adler v. Federal Republic of Nigeria,* 107 F.3d 720, 727 (9th Cir.1997). In support of its position, the Bank of China cites decisions from a number of circuits that have indeed embraced this requirement in cases brought under the third clause. *See, e.g., Adler, supra; United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232 (10th Cir.1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed.2d 787 (1995); *Antares Aircraft,*

L.P. v. Federal Republic of Nigeria, 999 F.2d 33 (2d Cir.1993), *cert. denied,* 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994); *General Elec. Capital Corp. v. Grossman,* 991 F.2d 1376 (8th Cir.1993). The Fifth Circuit, however, has not adopted this requirement and, we think, for good reasons.

First and foremost, nothing in the text of the third clause supports such a requirement. It simply requires (1) an act outside the United States (2) in connection with commercial activity outside the United States (3) that causes a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2). Under the third clause, then, the only act that must be legally significant — that is, give rise to or form the basis of the cause of action — is the act *outside* the United States. In *Weltover,* the Supreme Court expressly admonished the circuit courts not to add "any unexpressed requirement[s]" to the third clause and specifically rejected the argument that direct effects must be substantial or foreseeable. *See* 504 U.S. at 618, 112 S.Ct. at 2168. The legally significant act requirement is unexpressed in the third clause and, thus, has been renounced by *Weltover.*

Courts still refusing to discard the legally significant acts requirement have done so because *Weltover* ultimately found a direct effect in the fact that the foreign state in that case had, under its contract, breached its obligation to pay (*i.e.,* to perform) in the United States. *See, e.g., Antares,* 999 F.2d at 36 ("Although the Court did not expressly adopt our 'legally significant acts' test, it used a similar analysis.").[9] But *Weltover's* reliance on a legally

9. It is worth noting that a recent Second Circuit case appears to have jettisoned the legally significant act requirement. *See Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238 (2d Cir.1994). In *Commercial Bank,* the court found jurisdiction under the third clause based on the fact that the foreign state was contractually bound to remit

(Cont'd)

significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause. *See Goodman Holdings v. Rafidain Bank,* 26 F.3d 1143, 1147 (D.C.Cir.1994) (Wald, J., concurring). A legally significant act in the United States will certainly cause a direct effect in the United States, but that does not mean that a direct effect in the United States can be caused *only* by a legally significant act in the United States. As the Court stated in *Weltover,* "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity,' " and it need not be "foreseeable" nor "substantial." 504 U.S. at 618, 112 S.Ct. at 2168 (citation omitted).[10]

Second, requiring the effect to have a causal nexus with some legally significant act in the United States merges the

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(Cont'd)

funds to New York banks, even though the foreign state's failure to do so was not the basis of the cause of action (and thus not a legally significant act), but merely an immediate consequence (or direct effect) of the foreign state's commercial activity outside the United States. *See id.* at 241.

10. In *Weltover,* the argument was made that the foreign state's failure to pay bonds in New York City threatened the city's status as a "preeminent commercial center" and was thus a direct effect in the United States. Rejecting the argument, the Court suggested that an effect may be "too remote or attenuated" to support jurisdiction under the third clause. *Weltover,* 504 U.S. at 618, 112 S.Ct. at 2168. Understood in context, this conclusion does not imply that the effect must be based on a legally significant act in the United States. Rather, it means that the third clause does not permit jurisdiction over foreign states whose acts cause only speculative, generalized, immeasurable, and ultimately unverifiable effects in the United States. *See id.* ("Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States.")

third clause into the second clause of the commercial activity exception. The second clause requires that the cause of action be based upon (1) an act in the United States (2) in connection with commercial activity outside the United States. *See* 28 U.S.C. § 1605(a)(2). Thus, under the second clause, the act *in the United States* must give rise to the cause of action or, in other words, be a "legally significant act" as the term is used by courts adopting such a requirement. But if the third clause is read to require a legally significant act in the United States, it becomes indistinguishable from the second clause except, perhaps, that the third clause would also require proof of an act outside the United States upon which the action is also based and which caused a direct effect in the United States. Of course, this interpretation of the third clause leaves it with no perceivable purpose, as plaintiffs would always opt to seek jurisdiction under the "lesser included" second clause. We are confident Congress did not intend such a meaningless construction of the commercial activity exception and, therefore, decline to adopt the legally significant act requirement under the third clause.

(b)

We also reject the Bank of China's contention that *Callejo* is distinguishable on its facts. In *Callejo,* the plaintiffs, citizens of the United States, purchased certificates of deposit from the defendant, a nationalized bank of Mexico. To make deposits with the defendant, the plaintiffs would instruct their bank in Texas to wire funds through another Texas bank to their account with the defendant. Interest on the certificates of deposit was typically paid to the plaintiffs by virtue of the same process of interbank transfers. Such transfers occurred over the course of 2-3 years, when the Mexican government froze interest payments at an amount below the market rate. The plaintiffs

sued for breach of contract. Rejecting the defendant's claim of sovereign immunity under the FSIA, this court found jurisdiction under the third clause of the commercial activity exception. *See* 764 F.2d at 1110-12.

Contrary to the Bank of China's contentions, our holding in *Callejo* did not turn on whether the place of payment was in the United States. Indeed, the *Callejo* court refused to attach any significance whatsoever to where the certificate of deposits were payable as a technical legal matter. *See id.* at 1112 ("we do not perceive any material difference whether the legal place of payment was Mexico or the United States"). The third clause of the commercial activity exception, the court reasoned, was designed to avoid the kind of problems such questions created:

> [A]rcane doctrines regarding the place of payment are largely irrelevant. . . . "Congress did not intend to incorporate into modern law every ancient sophistry concerning 'where' an act or omission occurs. Conduct crucial to modern commerce — telephone calls, telexes, electronic transfers of intangible debits and credits — can take place in several jurisdictions. Outmoded rules placing such activity 'in' one jurisdiction or another are not helpful here."

Id. (quoting *Texas Trading*, 647 F.2d at 311 n. 30). Instead of focusing on where payment occurred in the wire transfers of money, the court turned its analysis to the effects of the defendant's activity and whether those effects were felt in the United States. *See id.* at 1111-12.

Nor does the viability of our holding in *Callejo* depend on the continuous nature of the foreign state's activity in the United

States in that case. *Callejo* held that because the plaintiffs, and the bank account into which interest payments were to be made, were located in the United States,[11] "the effects of [the defendant's] breach were inevitably felt by them there." *Id.* The court's finding in this respect did not turn on the substantiality of those effects. The court did go on to point out (consistent with then-current doctrine) that the defendant's activity in the United States was also continuous and thereby made effects in the United States "foreseeable." *See* 764 F.2d at 1112. However, as we recognized in *Walter Fuller Aircraft,* the Supreme Court's rejection of the substantiality and foreseeability requirements in *Weltover* simply lowered the standard for finding jurisdiction under the third clause. *See* 965 F.2d at 1387. Thus, *Callejo*'s consideration of these factors was, in the light of *Weltover,* unnecessary once the court found direct effects in the United States. Again: a nontrivial effect in the United States need only be an immediate consequence of the foreign state's activity to support jurisdiction under the third clause.

C

Applying *Callejo* to the instant case, we are persuaded that the pleadings demonstrate facts sufficient to support the district court's jurisdiction over the Bank of China under the third clause of the commercial activity exception. Voest-Alpine is an American corporation that suffered a nontrivial financial loss in the United States in the form of funds not remitted to its

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11. *Callejo* did not hold that any financial loss suffered by an American plaintiff, regardless of where that loss was incurred, is alone sufficient to constitute a direct effect under the third clause, *cf. Texas Trading,* 647 F.2d at 312 & n. 35 (discussing cases), and we make no attempt to answer that question here.

account at a Texas bank. Voest-Alpine expressly instructed the Bank of China to wire payment on the letter of credit directly into Voest-Alpine's bank account in Houston, if the necessary documents were conforming. As the Bank of China conceded at oral argument, when the necessary documents are conforming, it is the Bank's customary practice to send payments on a letter of credit to wherever the presenting party specifies. In other words, had the Bank of China not found it necessary to refuse payment, it would have wired the money directly to Voest-Alpine's Texas bank account. Clearly, then, the Bank of China's failure to pay on the letter of credit caused a direct effect in the United States, that is, Voest-Alpine's nonreceipt of funds in its Texas bank account followed as an "immediate consequence" of the Bank of China's actions.[12]

The Bank of China failed to prove otherwise. Although Voest-Alpine bore the initial burden of alleging facts which demonstrated that the commercial activity exception applied (*i.e.*, it bore a burden of production), the Bank of China bore the ultimate burden of persuasion on the question of immunity. *See Arriba*, 962 F.2d at 533.[13] It failed to meet this burden. As the district court concluded:

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12. The same conclusion obtains even if the relevant conduct is the Bank of China's failure to reject the documents within seven banking days inasmuch as an immediate consequence of this failure was Voest-Alpine's entitlement to receive payment under the letter of credit, a payment which the Bank of China failed to make.

13. In cases where the parties dispute key facts, "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 534. Since the material facts were not in dispute here (the letter of credit and other documents representing the scope of the agreement between the parties were attached to the complaint), the district court did not order discovery.

> [T]he pleadings indicate that the relevant funds are to be transferred directly from the [Bank of China] to the United States. Bank of China provides no evidence of any account outside the United States into which [Voest-Alpine] was to receive money under the letter of credit. [The Bank of China's] refusal to forward funds under the letter of credit clearly has a direct effect in the United States — [Voest-Alpine] does not recover payment under the letter of credit for goods it shipped from the United States to China.

The pleadings support jurisdiction under the third clause of the commercial activity exception and, therefore, the district court's refusal to dismiss Voest-Alpine's action for lack of jurisdiction was not error.[14]

IV

In sum, we hold that a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception to the FSIA. Here, Voest-Alpine, an American corporation, incurred a nontrivial financial loss in the United States as a direct result of the Bank of China's failure to pay on a letter of credit it issued. This loss is sufficient to support jurisdiction under the third clause. Accordingly, the judgment of the district court is AFFIRMED.

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14. Because we find jurisdiction proper under the third clause, we do not reach Voest-Alpine's argument (with which the district court agreed) that jurisdiction also existed under the first clause of the commercial activity exception based on its allegations that Texas was the place of payment.

Appendix A

REAVLEY, Circuit Judge, concurring:

I must accept this decision as consistent with the precedent of this circuit. The panel in *Callejo* plainly said that "the question of whether there was a direct effect in the United States can be resolved without reference to the place of payment. Since the Callejos were located in the United States, the effects of Bancomer's breach were inevitably felt by those there."[1]

The Supreme Court's opinion in *Weltover* does not overrule our precedent. The plaintiffs were not American companies and the Court repeated the statement that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.' "[2]

My own reading of the statute would be that a consequential loss, the result and not an element of the claim itself, is less than "direct." If the mere financial loss resulting from the breach or tort satisfies the statute, an American plaintiff need prove only commercial activity. Perhaps that was the intent of Congress, but I agree with the other circuits. As the Tenth Circuit said in *United World Trade, Inc. v. Mangyshlakneft Oil Production Association:*

> Nor is the fact that UWT is an American corporation that suffered a financial loss sufficient to place the direct effect of the defendant's actions "in the United States." Appellant would have us interpret § 1605 (a)(2) in a manner that would give the district courts

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1. 764 F.2d at 1111-12.

2. 504 U.S. at 618, 112 S.Ct. at 2168.

> jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state. We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a "direct effect" in the United States makes it unlikely that this was Congress' intent.[3]

Other circuits are in accord with the Tenth. In *Antares Aircraft v. Federal Republic of Nigeria,* the Second Circuit found that although a contractual provision designating the United States as the place of performance may be sufficient to create jurisdiction, Nigeria's wrongful detention in Nigeria of an American corporate plaintiff's plane and demand for the plaintiff to make payments to various accounts, including a bank account in California, is insufficient for the "direct effect" exception.[4] The *Antares* court was looking for a legally significant act in the United States in order to grant jurisdiction. Similarly, in *Goodman Holdings v. Rafidain Bank,* the D.C. Circuit Court determined that the foreign bank's failure to honor a letter of credit was not a "direct effect" because no United States location was designated as the place of performance.[5] That court based its conclusion, in part, on the fact that payment in the United States was not a contractual requirement, but merely at the request of the beneficiary to the letter of credit. Further, Judge Wald's concurrence only pointed out that the

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3. 33 F.3d 1232, 1239.

4. 999 F.2d 33 (2d Cir. 1993).

5. 26 F.3d 1143, 1147 (D.C.Cir. 1994).

involvement of the New York bank might as well have been by customary practice, whether or not the contract specified payment there.

APPENDIX B — ORDER FOR THE UNITED STATES DISTRICT COURT OF TEXAS HOUSTON DIVISION DATED JUNE 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-95-4954

VOEST-ALPINE TRADING USA CORPORATION

Plaintiff,

versus

BANK OF CHINA, ET AL.

Defendants.

ORDER

Before the Court are Defendant Bank of China's motions, (Instrument Nos. 54, 62), seeking reconsideration of this Court's previous Order denying Defendant's motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), (Instrument No. 53). Also before the Court is Defendant's application to stay further proceedings until the issue of immunity is resolved. (Instrument No. 58). Upon review of the submitted papers and applicable law, the Court finds that Defendant's reconsideration motions should be **DENIED.** The Court also finds that Defendant's application to stay proceedings should be **GRANTED.**

Appendix B

I.

Defendant Bank of China previously sought dismissal for lack of subject matter and personal jurisdiction. Plaintiff asserted jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). Reviewing the applicable FSIA immunity exceptions that would allow jurisdiction over Defendants, the Court found that it needed additional information on the terms of the relevant agreements to make a determination on the applicability of the FSIA direct effect immunity exception. (Order, Instrument No. 53, at 6). The Court denied Defendant's motions for judgment on the pleadings based on the jurisdictional issue.

The Court erroneously determined that neither party had submitted a copy of the relevant letter of credit. Defendant is correct in its assertion that a copy of an "operative" letter of credit was annexed to Plaintiffs Original and Amended Complaints. (Instrument No. 1, 40). However, this factor does not change the Court's determination of the jurisdictional issue.

As noted in the previous Order, once a defendant demonstrates it is a foreign state, the plaintiff has the burden to plead facts indicating the applicability of an FSIA immunity exception. Fifth Circuit case law clearly establishes that the party claiming immunity bears the ultimate burden of persuasion on the nonapplicability of an immunity exception. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992).

Plaintiff pleads sufficient facts indicating the applicability of an FSIA commercial activity exception which excludes immunity from suit where the action is based "upon an act

outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).[1] The complaint alleges that Defendant Bank of China issued an irrevocable letter of credit either through a branch in China or its New York branch, listing Plaintiff as beneficiary. (Amended Complaint, Instrument No. 40, at 4). Plaintiff also alleges that the New York branch notified Plaintiff of the letter of credit posting, that Texas Commerce Bank in Houston acted as a negotiating or presenting bank in gathering and forwarding the relevant documentation to the Bank of China for payment, and that Defendant refused payment. These allegations are sufficient to indicate, at the very least, that the lawsuit (1) is based upon an act taken outside the United States, i.e., Defendant's refusal to forward payment under the letter of credit, (2) that was taken in connection with a commercial activity of the Defendant outside the United States, i.e., issuing the letter credit[2] (3) that caused a direct effect in the United States, i.e., Plaintiffs nonreceipt of funds under the letter of credit. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

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1. Plaintiff had asserted other FSIA immunity exceptions. However, because Defendant failed to establish the nonapplicability of the direct effect exception, the Court did not consider other applicable exceptions. The Court also finds that Plaintiff pleads sufficient facts indicating an immunity exception for an action "based upon a commercial activity carried on in the United States by the foreign state. . . ." 28 U.S.C. § 1605(a)(2). The Court makes no determination as to any other applicable immunity exception.

2. This factor assumes that the letter of credit was issued through the China branch. Plaintiffs allegation that the letter of credit was issued through the New York branch indicates the applicability of the immunity exception for commercial activities "carried on in the United States by the foreign state. . . ." 28 U.S.C. § 1605(a)(2).

Thus, Defendant bears the burden of persuasion on the nonapplicability of immunity under the FSIA. Defendant urges that *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n,* 33 F.3d 1232, 1237-39 (10th Cir. 1994) supports a finding of immunity in this case. *United World Trade* involved a contract formed by parties in Moscow for the delivery of oil from Kazakhstan to Sicily. *Id.* at 1239. The purchaser would forward payment to the plaintiff buyer's London bank, who would then make payment to the defendant supplier in Paris. The plaintiff, seeking recovery for defendant's alleged refusal to supply oil, asserted the FSIA direct effect exception to the defendant's immunity claim based on the fact that the London bank was to forward the purchaser's payment to a New York bank for conversion to United States currency, which would then transfer defendant's share of the proceeds to the Paris bank and plaintiffs share to a Denver account. *Id.* at 1237.

The Tenth Circuit determined that transfer and conversion of funds in the United States did not constitute a direct effect of the commercial activity at issue on the suit, i.e., the sale of oil. As the Court observed, "no part of the contract in this case was to be performed in the United States. Under the contract, [defendant] was obligated to transfer oil from Kazakhstan to Sicily. No part of [defendant's] performance was to take place in the United States." *United World Trade,* 33 F.3d at 1237. The Court further found that the payment provision of the contract did not provide a basis for a "direct effect" in the United States because, under the provision, Plaintiff was to make payment for the oil to Defendant's bank in Paris, making Paris the place of plaintiff's contractual obligation. *Id.* at 1237-38. Following the Supreme Court's definition of "direct" as, "an immediate consequence of the defendant's activity," *Weltover, 504 U.S.* at 617-18, the Tenth Circuit determined that "[t]he entire series of banking transactions . . . from Sicily to London

to New York to Paris — cannot be considered an 'immediate consequence' of the defendant's activity' under any common sense reading of that phrase." *United World Trade,* 33 F.3d at 1238.

Finally, the Court determined that plaintiff's allegation of lost profits and other harm suffered in the United States did not constitute a "direct effect" occurring in the United States. *United World Trade, 33* F.3d at 1238. The Court considered the totality of circumstances surrounding the delivery and payment obligations and found that the legally significant acts giving rise to the claim — presumably, the defendant's refusal to supply oil from Kazakhstan to Sicily — occurred outside the United States. The Court concluded that plaintiffs loss of additional funds in London that would have been transferred to the United States was not sufficient to warrant the exercise of jurisdiction under the FSIA direct effect exception. *Id.* at 1239.[3]

Contrary to Defendant's assertions, this case differs significantly from *United World Trade.* The basis of the action in this case is Defendant's refusal to pay on the letter of credit. The operative letter of credit provides that "negotiating bank must forward all documents to Bank of China . . . and we will pay upon receipt of documents and drafts all in order." Defendant asserts that the place of presentment and performance

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3. The Court also observed that "[t]he attempt to locate the site of financial harm to a corporation, particularly where the cause of the injury is an omission, [is] . . . an enterprise fraught with artifice." *United World Trade,* 33 F.3d at 1239 (citation and quotations omitted). In this case, the site of the financial harm clearly is less ambiguous than that of *United World Trade.* The only ascertainable place for the receipt of funds under the letter of credit is in the United States.

is in China. However, the pleadings indicate that the relevant funds are to be transferred directly from the Defendant to the United States. Defendant provides no evidence of any account outside the United States into which Plaintiff was to receive money under the letter of credit. Defendant's refusal to forward funds under the letter of credit clearly has a direct effect in the United States — Plaintiff does not recover payment under the letter of credit for goods it shipped from the United States to China. Defendant has failed in its burden as to the nonapplicability of the FSIA direct effect exception.

Defendant also challenges the Court's determination that Defendant is not entitled to judgement because of improper venue. As noted in the Court's previous Order, the FSIA provides that venue is appropriate where "a substantial part of the events or omissions giving rise to the claim occurred, . . ." and where a foreign state's "agent or instrumentality is licensed to do business or is doing business. . . ." 28 U.S.C. §§ 1391(f)(1), (f)(3).

Plaintiff submits correspondence between Texas Commerce Bank and Defendant Bank of China indicating that Defendant refused payment of the letter of credit because of improprieties in the documentation forwarded by Texas Commerce Bank. (Exhibits B, C, D, & E, attached to Plaintiff's Amended Complaint, Instrument No. 40). Texas Commerce Bank gathered and forwarded the relevant documents from Houston, Texas on behalf of Plaintiff, whose principal place of business is in Houston, Texas, and Defendant's refusal to pay arises out of Texas Commerce Bank's alleged improprieties. Thus, a substantial part of the events giving rise to Plaintiff's claim for payment under the letter of credit occurred in this district.

Appendix B

Defendant's motion for reconsideration of the Court's previous Order, (Instrument No. 53), is **DENIED.**

II.

Defendant requests a stay of these proceedings until the issue of immunity is finally resolved either through this Court's grant of immunity or through the appellate process. (Instrument No. 58). A denial of a claim of sovereign immunity under the FSIA is immediately appealable under the collateral order doctrine. *MCI Telecommunications Corp. v. Alhahood,* 82 F.3d 658, 661 (5th Cir.), *cert. denied,* 117 S. Ct. 509 (1996). The Court finds that all proceedings in this action should be stayed until the issue of immunity is resolved through the appellate process. *In re Ramu Corp.,* 903 F.2d 312, 318 (5th Cir. 1990) (district court has wide discretion to stay pending matter, so long as stay not immoderate or of indefinite duration).

Accordingly, Defendant's application for stay of proceedings in this Court is **GRANTED.** Proceedings in this action shall resume immediately upon resolution of the immunity issue on appeal.

The Clerk shall enter this Order and provide a true copy to all parties.

SIGNED this 28th day of June, 1997.

s/ Vannessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 17, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20322

VOEST-ALPINE TRADING USA CORPORATION

Plaintiff-Appellee

BANK OF CHINA; BANK OF CHINA NEW YORK BRANCH

Defendants

BANK OF CHINA

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 06/12/98, 5 Cir., _____, _____ F.3d _____)

Before POLITZ, Chief Judge, REAVLEY, and JOLLY, Circuit Judges.

Appendix C

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel or judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the recondsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED

ENTERED FOR THE COURT:
s/ [illegible]
United States Circuit Judge

(2)

No. 98-570

FILED
NOV 5 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

BANK OF CHINA,

Petitioner,

vs.

VOEST-ALPINE TRADING USA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether a foreign sovereign who has engaged in a commercial transaction with an American corporation, and who then fails to remit funds into the corporation's designated bank account in the United States, waives its sovereign immunity under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2).

STATEMENT PURSUANT TO RULE 29.6

There are no nonwholly owned subsidiaries of Respondent. Voest-Alpine Intertrading AG is Respondent's parent.

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APPENDIX

Appendix A — UCP 500 Article 10(a)-10(b) 1a

STATEMENT OF THE CASE

Respondent adopts the United States Court of Appeals for the Fifth Circuit's recitation of the factual and procedural background of this proceeding.[1] Petitioner's rendition of the facts contains misstatements or errors that are clarified in the following discussion. These errors demonstrate that Petitioner's complaints are based upon factual findings of the District Court and the Fifth Circuit, and not the Fifth Circuit's refusal to impose the "legally significant act" test to the direct effect exception to foreign sovereign immunity.

A. The Question Presented For Review Is Based Upon The Factual Analysis Of The Courts Below, Not The Propriety Of Imposing The "Legally Significant Act" Test, As Petitioner Suggests.

Petitioner's rendition of the question presented is inaccurate. The question presented here is the same question articulated by the Fifth Circuit in the opening paragraph of its opinion. [App. at 2a]. In this case, a foreign sovereign engaged in an admittedly commercial transaction (issuance of an irrevocable letter of credit) with an American corporation. The issue is whether Petitioner waived its sovereign immunity by failing to pay the Letter of Credit to Respondent's properly designated United States bank account. Respondent submits that immunity was waived. More importantly, at least at this point, Petitioner's fact bound contentions have been rejected by the District Court and by the Fifth Circuit.

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1. The Opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at pages 1a through 22a of Petitioner's Appendix (hereinafter, "Appendix"). The factual and procedural background of the Opinion is located at pages 2a through 7a.

There are four basic flaws in Petitioner's analysis. First, the Fifth Circuit's opinion did not hold that mere consequential financial loss of an American plaintiff is sufficient to sustain jurisdiction under the "direct effect" exception. In fact, the Fifth Circuit expressly stated it was *not* deciding this very issue. [App. at 17a n.11].

Second, Petitioner's statement of the question presented suggests this Court's opinion in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), included a requirement that some "legally significant act" occur within the United States to fulfill the direct effect exception. While several circuit courts seemingly have adopted a "legally significant act" test, it does not appear to be part of this Court's decision in *Weltover*.[2]

Third, Petitioner's statement of the question suggests no "legally significant act" occurred in the United States, despite the fact the District Court and the Fifth Circuit found that payment on the letter of credit was to be made to Respondent's account in Houston, Texas.[3]

Fourth, Petitioner fails to address the fact it carried the ultimate burden of persuasion in disproving the FSIA exception. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992). Both the District Court and the Fifth Circuit found Petitioner failed in this burden. [App. at 18a, 26a].

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2. The Second Circuit has acknowledged that this Court did not "expressly adopt" the "legally significant acts" test in *Weltover*. *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993).

3. The District Court also found that the facts plead by Respondent supported jurisdiction under the first clause of § 1605(a)(2). [App. at 25a n.1].

B. Respondent's Designation Of A Place Of Payment In The United States Contradicts Petitioner's Claim That Performance Was To Occur In China.

Petitioner attempts to convince this Court the contractual place of performance was in China. This is illustrative of the Petitioner's challenge to the factual findings, rather than the application of the law. Petitioner asserts the Letter of Credit called for presentment of documents at the Jiangyin Sub-branch's counters. [Pet. at 3]. This assertion ignores the terms of the Letter of Credit. The Letter of Credit at issue here did not designate a place of payment.

The Letter of Credit specifically provides it is to be governed by the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500"). Under the UCP 500 Article 10(a), all credits must clearly indicate whether they are available by: (1) sight payment; (2) deferred payment; (3) acceptance; or (4) negotiation. The Letter of Credit in the instant case was a "negotiation credit," stating "credit available by negotiation of beneficiary's draft. . . ."[4] Under UCP 500 Article 10(b), a credit must also specify a Nominated Bank which is authorized to pay or negotiate the credit. In the case of a freely negotiable credit, "any bank is a Nominated Bank." UCP 500 Art. 10(b).

Because the Letter of Credit was freely negotiable, it is inaccurate for the Petitioner to suggest China was the designated place of payment. Petitioner placed no limitations on where the Letter of Credit could be negotiated. It is undisputed that Respondent designated its United States account as the place of Petitioner's final contractual obligation — payment of the

4. The Letter of Credit is attached to Respondent's Amended Complaint. [Doc. 40, p. 9].

Letter of Credit — and Petitioner has never objected to this designation. As noted by the Fifth Circuit, is was Petitioner's burden to prove otherwise. [App. at 18a].

C. Respondent's Cause Of Action Is Based On Petitioner's Failure To Pay Rather Than Where The Rejection Occurred.

The elements of Respondent's cause of action are: (a) issuance of the Letter of Credit; (b) timely presentation of necessary documents; and (c) failure to pay on the Letter of Credit. [App. at 9a]; *See also Goodman Holdings v. Rafidain Bank,* 26 F.3d 1143, 1146 (D.C. Cir. 1994) (listing proper elements for suit on letter of credit).

Respondent's claim is predicated upon Petitioner's failure to make payment of USD 1.2 million to Respondent's United States bank account, not upon Petitioner's failure to reject Respondent's presentation within the seven banking day deadline imposed by the UCP 500.[5] Petitioner attempts to couch the suit in terms of where it failed to timely reject documents, which occurred in China, and not where it failed to make payment, which occurred in the United States. This is another illustration of Petitioner's effort to challenge the Fifth Circuit's factual findings, rather than the legal analysis.

D. Petitioner Mischaracterizes The Opinion And Analysis Of The Fifth Circuit.

Petitioner makes several interpretations of the Fifth Circuit's opinion in this case which are erroneous.

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5. Petitioner apparently continues to assert it rejected Respondent's documents in a timely fashion. This is untrue, as noted by the Fifth Circuit. [App. at 4a].

First, Petitioner repeatedly suggests the Fifth Circuit recognized the existence of the "legally significant act" test in *Weltover*. [Pet. at 6-7]. This suggestion is incorrect. The Fifth Circuit expressly stated that "[t]he legally significant act requirement is unexpressed in the third clause and, thus, has been renounced by *Weltover*." [App. at 13a].

Second, Petitioner represents that the Fifth Circuit "expressly acknowledged Petitioner's contentions that, in this case, no legally significant act took place or was to take place in the United States. . . ." [Pet. at 6]. This is simply untrue. The Fifth Circuit did not hold that a "legally significant act" was lacking from the instant case, but rather stated that the "legally significant act" test has not been adopted by the Fifth Circuit. The Fifth Circuit said *Weltover* expressly jettisoned " 'any unexpressed requirement[s]' to the third clause," including, by implication, the "legally significant act" test. [App. at 13a].

The Fifth Circuit correctly recognized and noted that applying the "legally significant act" test as a requisite element of the third clause would render the third clause meaningless ("requiring the effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception.") [App. at 14a-15a]. The Fifth Circuit further addressed this point by framing the jurisdictional issue as "whether the Bank of China's failure to pay occurred in the United States (first clause) or caused a direct effect in the United States (third clause)." [App. at 9a]. The Fifth Circuit properly recognized that the question of where the "legally significant act" occurred (such as the issue of where the failure to pay took place) is a question more properly reserved for an application of clause one of the commercial activity exception.[6] This analysis was reinforced

6. At least one commentator has recognized that the question of (Cont'd)

by the Fifth Circuit's restatement of the holding in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir. 1985). In *Callejo*, the Court held the "direct effect" clause of the commercial activity exception (clause three) did not inquire as to the situs of payment. [App. at 16a]. In short, imposing the "legally significant act" requirement on the "direct effect" clause would improperly result in a "meaningless construction" of the commercial activity exception. [App. at 15a].

Finally, Petitioner attempts to simplistically distill the analysis of the Fifth Circuit as only requiring an American corporation to suffer some financial loss in order to provide the requisite direct effect. [Pet. at 7]. Petitioner suggests this was the foundation of the Fifth Circuit's decision. This suggestion is incorrect as the Fifth Circuit refused to address whether any nontrivial financial loss suffered by an American plaintiff, regardless of where the law was incurred, is sufficient to constitute a direct effect under the third clause. [App. at 17a n.11]. As noted by the Fifth Circuit, *Callejo* did *not* hold that mere financial loss suffered by an American plaintiff is alone sufficient to support FSIA jurisdiction. [App. at 17a n.11]. It is difficult to reconcile Petitioner's rendition of the Opinion with the actual text.[7]

(Cont'd)

where a legally significant portion of the transaction occurred is relevant to the first clause of the commercial activity exception. Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction under the Commercial Activity Exception*, 13 REV. LITIG. 143, 150 (1993).

7. The foundation for the Fifth Circuit's decision rests on several factors notably absent from Petitioner's account. The Fifth Circuit summarized the factors culminating in its decision with:

(Cont'd)

REASONS FOR DENYING THE WRIT

Petitioner artfully attempts to characterize the issue before this Court as a prime candidate for review by suggesting the Fifth Circuit has created a new rule that squarely conflicts with the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits. [Pet. at 7]. Petitioner repeatedly asserts that the Fifth Circuit has created a rule where an American plaintiff need only show some nontrivial harm in order to fall within the direct effect exception. [Pet. at 7]. A fair reading of the Fifth Circuit's opinion does not support Petitioner's contentions, and reveals that Petitioner has misstated the question presented. The actual question presented in this case does not warrant review by this Court.

Petitioner failed to meet its burden of persuasion in disproving the existence of the commercial activity exception,

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(Cont'd)

> Voest-Alpine is an American corporation that suffered a nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank. Voest-Alpine expressly instructed the Bank of China to wire payment on the letter of credit directly into Voest-Alpine's bank account in Houston, if the necessary documents were conforming.
>
> * * *
>
> Clearly, then, the Bank of China's failure to pay on the letter of credit caused a direct effect in the United States, that is, Voest-Alpine's nonreceipt of funds in its Texas account followed as an "immediate consequence" of the Bank of China's actions.

[App. at 18a].

and seeks another opportunity to do so before this Court. Petitioner has steadfastly maintained that the contractual place of performance — meaning the place of payment — was to be in China. Petitioner has improperly analyzed the elements of Respondent's cause of action, ostensibly to concentrate on events that occurred solely in China. Both the District Court and the Fifth Circuit disagreed with these contentions. The basis of Petitioner's complaint is not the fact the Fifth Circuit refused to adopt the "legally significant act" test. Instead, the basis is Petitioner's belief that both the District Court and the Fifth Circuit's opinion contain erroneous factual findings on the place of payment under the Letter of Credit, and Petitioner's disagreement with the elements of Respondent's cause of action. Under these circumstances, there is no cause for this Court's review. SUP. CT. R. 10(c).

Additionally, even if this Court were to look past Petitioner's flawed analysis and determine a split in the circuits does exist, the facts in this case support jurisdiction under the "legally significant act" test. There is no dispute that Respondent designated its United States account as the place of payment. Nothing in the Letter of Credit prohibited this designation. As a negotiable credit, Petitioner essentially invited this designation, a fact acknowledged in oral argument. It was Petitioner's burden to show this designation was inappropriate, and it did not. [App. at 18a]. Having failed in this burden, there is no good reason for this Court to give Petitioner another opportunity to argue a factual question that must be accepted as true.[8]

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8. The appeal arises from the District Court's denial of a motion to dismiss pursuant to FED. R. CIV. P. 12(c). All of the factual contentions contained within Respondent's pleadings must be accepted as true. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S. Ct. 1471, 1474, 123 L. Ed. 2d 47 (1993).

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — UCP 500 ARTICLE 10(a)-10(b)

ICC Uniform Customs and Practice for DOCUMENTARY CREDITS

Article 10

Types of Credit

a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b i. Unless the Credit stipulates that it is available only with the issuing Bank, all Credits must nominate the bank (the "Nominated Bank") which is authorised to pay, to incur a deferred payment undertaking to accept Draft(s) or to negotiate. In a freely negotiable Credit, any bank is Nominated Bank.

Presentation of documents must be made to the issuing Bank or the Confirming Bank, if any or any other Nominated Bank.

ii. Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

(3)

No. 98-570

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In The

Supreme Court of the United States

October Term, 1998

BANK OF CHINA,

Petitioner,

vs

VOEST-ALPINE TRADING USA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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In Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Bank of China[1], Respondent argues a new point, i.e. that the Petition herein is based, not upon the split in the circuits on a controlling issue of law as expressly acknowledged by the Fifth Circuit in its decision below, but rather upon Petitioner's disagreement with "factual findings" made by the District Court and the Fifth Circuit concerning Petitioner's letter of credit.[2] (Opp'n Br. at 1.)

Both decisions below, as well as the record on appeal, demonstrate that Respondent's argument is incorrect.

THE PETITION IS BASED NOT UPON DISAGREEMENT WITH ANY "FACTUAL FINDINGS" MADE BELOW BUT RATHER UPON THE FIFTH CIRCUIT'S ERRONEOUS AND CIRCUIT-SPLITTING CONCLUSIONS OF CONTROLLING LAW.

This case comes to this Court from the Fifth Circuit's affirmance of the District Court's denial of Petitioner's Fed. R. Civ. P. 12(c) motion for judgment on the pleadings to dismiss the Complaint for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1604.

Because Petitioner's motion was for judgment on the pleadings, Petitioner, the District Court, and the Fifth Circuit

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1. For Petitioner's statement pursuant to Sup. Ct. R. 29.6, please see the Petition for Writ of Certiorari.

2. The decision of the United States Court of Appeals for the Fifth Circuit is set forth at pages 1a-22a of the Appendix to the Petition. The decision of the United States District Court for the Southern District of Texas is set forth at pages 23a-29a of the Appendix to the Petition.

were all required to assume the truth of the facts as stated in Respondent's Complaint and annexed exhibits.[3] Accordingly, Petitioner could not and did not dispute any assumed facts in the lower courts and certainly does not do so in its Petition in this Court. By the same token, neither the District Court nor the Fifth Circuit could or did make any "factual findings," as Respondent now asserts.[4]

The assumed facts are set forth in the Fifth Circuit's decision (App. at 3a-4a) and may be briefly stated as follows.

In July 1995, Petitioner's Sub-branch in Jiangyin, China, issued a letter of credit for the benefit of Respondent. The letter of credit required proper presentment of Respondent's documents and drafts to the Sub-branch in China and did not designate a particular place of payment.[5] (App. at 3a.)

In August 1995, Respondent's bank, Texas Commerce Bank ("TCB") in Houston, Texas, forwarded the documents to the Sub-branch, together with a cover letter requesting the Sub-branch's (i) notification of any discrepancies or (ii) confirmation of acceptance of the documents for payment and transmission of payment by wire to TCB in Texas. (App. at 4a.)

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3. The exhibits annexed to Respondent's Complaint (Doc. 40, pp. 1-8) included, *inter alia*, Petitioner's letter of credit (Doc. 40, pp. 9-10) and Respondent's bank's cover letter (Doc. 40, p. 17) upon which the decisions below were based.

4. Respondent concedes this point at the end of its Opposition Brief. (Opp'n Br. at 8 n.8.)

5. In fact, the letter of credit stated that the Sub-branch would "pay upon receipt of documents and drafts all in order." (Doc. 40, p. 10.)

Thereafter, the Sub-branch notified TCB of discrepancies in the documents and later declined to make payment. (App. at 4a.)

Applying the law to these assumed facts, the Fifth Circuit majority held that Respondent's failure to receive funds from Petitioner caused a sufficient "direct effect" in the United States to support application of the "commercial activity" exception to immunity set forth in 28 U.S.C. § 1605(a)(2). (App. at 19a.)

Significantly — and contrary to Respondent's Opposition argument (Opp'n Br. at 3) — neither the District Court nor the Fifth Circuit made a "factual finding" that Petitioner was contractually obligated to make payment in Texas, nor did they "find" that TCB's cover letter request for payment to be sent by wire to Texas was in any way binding upon Petitioner. (App. at 3a-4a, 17a-18a, 28a.)[6]

On the contrary, in the view of both the District Court and the Fifth Circuit majority, it was the fact of Respondent's financial loss in the United States in the form of funds not remitted by Petitioner from China that supported the "direct

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6. Respondent's argument concerning the free negotiability of the letter of credit under Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500") ignores both that the letter of credit itself required presentation of documents in China (App. at 3a, Doc. 40, p. 10), which thereby remained the place of performance and payment, and that TCB did not "negotiate" Respondent's documents in Texas but instead "presented" Respondent's documents "for negotiation" in China (Doc. 40, p. 17). (UCP 500 is reproduced in its entirety as Appendix C to J. Dolan, *The Law of Letters of Credit: Commercial and Standby Credits* (rev. ed. 1996).)

effect" exception. (App. at 17a-18a, 28a.) As the Fifth Circuit majority stated:

> Because a financial loss was incurred in the United States by an American plaintiff as an immediate consequence of the foreign state's commercial activity abroad, the loss constituted a direct effect within the scope of the third clause of the commercial activity exception. We, therefore, affirm.

App. at 2a-3a.

As discussed in the Petition (Pet. at 7-15), the Fifth Circuit's ruling in this case places it in direct conflict with the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits and extends application of the "direct effect" immunity exception far beyond the limits of this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

In *Weltover*, Argentina issued bearer bonds that specified four places of performance and payment, including New York. Plaintiffs in that case chose New York and, when Argentina refused to pay on time, brought suit. This Court declared:

> Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.

504 U.S. at 619.

In this case, however, the United States was not the situs of any "ultimate contractual obligations" on Petitioner's part but was rather the situs of Respondent's ultimate financial loss. This was not a matter of "factual dispute" in the courts below

and is not in dispute here. Rather, Petitioner disputes the Fifth Circuit majority's legal conclusion that such financial loss alone supports application of the commercial activity exception as being contrary to this Court's decision in *Weltover*, to the controlling law of five other Courts of Appeals, and to the FSIA itself.

As Judge Reavley stated in his "concurring" opinion below (App. at 20a-22a), the effect of the Fifth Circuit majority's decision in this case is that the "mere financial loss" of an American plaintiff would obviate any need to demonstrate the "direct effect" required by the FSIA commercial activity exception, thereby permitting the exception in large measure to swallow the rule:

> My own reading of the [FSIA] would be that a consequential loss, the result and not an element of the claim itself, is less than "direct." If the mere financial loss resulting from the breach or tort satisfies the statute, an American plaintiff need prove only commercial activity. Perhaps that was the intent of Congress, but I agree with the other circuits. As the Tenth Circuit said in *United World Trade, Inc. v. Mangyshlakneft Oil Production Association*:
>
> > Nor is the fact that [plaintiff United World Trade, Inc.] is an American corporation that suffered a financial loss sufficient to place the direct effect of the defendants's actions "in the United States." Appellant would have us interpret § 1605(a)(2) in a manner that would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen . . . claims to have suffered a loss from the acts of a foreign

> state. We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a "direct effect" in the United States makes it unlikely that this was Congress' intent.

App. at 20a-21a, *citing United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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